FILE COPY

No. 555.

OCTOBER TERM, 1929.

Supreme Court of the United States

THE UNITED STATES OF AMERICA, Petitioner,

v.

ALFRED E. NORRIS.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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ARGUMENT.

It should be noted at the outset that the reason assigned in the petition for the invoking of the discretionary jurisdiction of this Court, to review this case on writ of certiorari, is that the question involved "is one of great public interest and importance." (Petition, p. 10.) It is not alleged that the decision of the circuit court of appeals is "in conflict with the decision of another circuit court of appeals on the same matter," that being one of the "character of reasons" which this Court has formulated as a guide for determining whether there are sufficient "special and important reasons" for the Court's exercising its discretion in granting the writ. Rule 38 (5).

Such an allegation could not properly be made, since by this decision the circuit court of appeals has simply placed itself in accord with two other circuit courts of appeals who disposed of the same identical question in exactly the same way. Moreover, the decision in this case lays down no new doctrine whatever and has no effect on the other matters referred to in the petition; and all of the general law in both the state and federal courts points to the same decision which the circuit court of appeals has made.

The petition also states (p. 11) that the decision has been given wide publicity; that unless corrected, it will have a very detrimental effect upon prohibition enforcement; that the reasons advanced in the opinion might equally prevent successful prosecution of a purchaser for a conspiracy to import liquor; and that the court has narrowed the scope of the Conspiracy Act, rendering it inapplicable to cases to which it properly applies. The decision has had no such effect, as we later show.

Of course, the question of publicity is immaterial; this Court cannot be expected to invoke its discretionary jurisdiction in a particular case because the decision of a circuit court of appeals has provided grist for the reportorial mill. It is, however, not inapropos to note that the reason why publicity followed the decision was because it was of interest to the public to know that the Department of Justice had failed in its attempt to persuade the judiciary to make a change in the federal criminal law beyond the legislative intent. The case had no public in-

terest on the ground that the decision marked a change in the law, because there had been no change.

The fact that it made no change clearly shows that the decision, if it stands, will not, as the petition alleges, "have a very detrimental effect" upon prohibition enforcement. Quite the contrary. This decision works no change in enforcement. The Prohibition Act has been administered for ten years without there ever having been one single conviction of a purchaser such as Norris for conspiracy to transport. It is, therefore, difficult to see how this decision can have any detrimental effect upon that enforcement, when the decision allows that enforcement to remain without change as it has always been. If the state of the law of criminal conspiracy, as shown by this case, is in such condition that it has detrimental effect on prohibition enforcement, then that same condition has existed as long as there has been prohibition to enforce. This decision has nothing to do with it. What the Department of Justice attempted to do in this case was to effect a change in the law and its enforcement, not to maintain its *status quo;* that attempt properly failed; to contend now that to allow this decision to stand will have a detrimental effect on enforcement, and to ask for reversal, is to plead for a change which looks to the future, but the making of such changes is the province of the legislature and not of the executive or judiciary. This is particularly true of the federal criminal law, which is purely a matter of legislation.

We do not see that there is any occasion for the fear that the reasons advanced by the circuit court of appeals, for its decision in this case, might prevent successful prosecutions of purchasers for a conspiracy to import liquor. We cannot conceive of any court relying upon the circuit court's decision in this case as a reason for frustrating a successful prosecution for conspiracy to import, or any other kind of conspiracy, when a case of conspiracy can be made out. The decision of this Court in *Ford* v. *United States*, 273 U. S. 593, clearly shows that a successful prosecution against a purchaser for conspiracy to import liquor can be maintained where the purchaser does more than Norris did and actually conspires at the importation. The decision in the instant Norris case throws no kind of immunity around the purchaser just because he is a purchaser. A conspirator remains a conspirator even though he also happens to be a purchaser. As the circuit court of appeals said in its opinion (R. 22), "There would be no difficulty in conceiving a set of facts which * * * would sustain * * * an indictment [for conspiracy to transport], notwithstanding the conspiracy existed between the seller and the buyer." The decision in this case simply is that merely being a purchaser does not carry with it the felony of being a party to a conspiracy to transport the liquor purchased when all that is done is that the *seller* delivers to the purchaser the liquor sold him.

Of course, if the purchaser goes further and does

more, it is entirely possible that he may make himself a conspirator. There are many cases where a defendant has been properly convicted of conspiracy, even though he happened also to have been a purchaser. *Becher* v. *United States*, 5 F. (2d) 45, is a good example. We comment on that case below at p. 6.

The decision of the circuit court of appeals in this case in no way narrows the scope of the Conspiracy Act so as to render it inapplicable to cases to which it would apply were it not for this decision. Since the decision has no general applicability beyond cases on the same facts, and neither overrules any prior cases nor makes any new law, it cannot have the effect of narrowing the Act.

In attempting to divert attention from the fact that this case is an attempt, by indirection, to make a crime out of a necessary incident to purchase (which is not a crime), the petitioner states that this case actually does not involve the question whether the purchase of liquor is an offense. (Petitioner's Brief, p. 13.) That is true, in the sense that this case is not on indictment for purchasing. But what it does involve is whether the purchaser of liquor is guilty of an offense, when all he did was purchase.

The question which this Court is asked to review has now been disposed of by the circuit courts of appeals for the second, third and fourth circuits, and all of them disposed of it in exactly the same way. In the face of such unanimity of opinion, it is difficult to suppose that all of them are wrong.

The question first arose in *Becher* v. *United States*, 5 F. (2d) 45 (2d C. C. A. 1924), a case of conspiracy, including conspiracy to transport. There had been a comprehensive plan involving the importation of liquor, its storage in bonded warehouses, and its withdrawal on forged permits and the procuring of bonds of indemnity against liability for import duties. One Birnbaum was admittedly in some way involved. He contended that he was merely a buyer of some of the imported liquor and that as nothing was proved against him except that *the liquor had been delivered to him* and found in his cellar, there was no proof that he was a conspirator. Judge Learned Hand, speaking for a unanimous court, said at page 50:—

> "We concede at once that merely as *buyer* he was not a party to the scheme in *any* criminal sense, that on the contrary the prosecution was bound to involve him *in the plan as a whole in some other sense.*" (Italics ours.)

Although some of the cases of this particular imported liquor were found in his cellar, with the marks obliterated,

> "Still all this was indeed equally consistent with his being a large buyer and did not show his complicity."

Thus we see that that circuit court of appeals expressly rejected the doctrine which the government advances here. Had that court agreed with such doctrine it would have simply said that even if the

facts were as Birnbaum contended, the result would nevertheless be that he had committed the crime of conspiring to illegally transport because the liquor he had bought had been delivered to him in fulfillment of his purchase. On the contrary, the court was at pains to go much further and show, through proofs of other acts (not of interest to us here because nothing of the sort is involved in the instant case), that Birnbaum was in complicity with the others and had himself acted in other ways in furtherance of the crimes which they all had conspired to commit.

The question next arose in *La Rosa* v. *United States,* 15 F. (2d) 479 (4th C. C. A. 1926). La Rosa was indicted, with others, for conspiracy, including conspiracy to transport. The only understanding La Rosa had with the others was that he would buy certain whisky from them and show them how to get it to his garage. He met them in his car outside the city where his garage was located, they being in their car with the whisky, and he piloted them, driving his own car, they following in theirs, to his garage where they left the whisky. Circuit Judge Rose, speaking for a unanimous court, said that La Rosa aided and abetted the transportation; but he added, at p. 481:—

> "We shall not go into the nice inquiry as to whether such an understanding would or would not suffice to sustain a charge that he [La Rosa] had entered into a conspiracy with them for the unlawful transportation of the liquor. If it does, seemingly anyone who agrees to buy liquor from

> a bootlegger, and tells him how to get it to his back door with it, commits an offense punishable by imprisonment in the penitentiary for as much as two years and by a fine of $10,000."

Judgment of conviction for conspiracy was reversed. The court sarcastically rejected the precise contention which the petitioner now renews in this Court. Yet the *La Rosa* case presented a stronger case for the Government than this case does, because La Rosa did much more than Norris did. The court said that La Rosa aided and abetted the transportation but even that was not sufficient to cause it to consider the question of the conspiracy to transport. The question in this case was squarely raised in the *La Rosa* case, both under the indictment and on the facts proved, so the refusal of that court "to go into the nice inquiry" is a clear holding that the Government's position was too tenuous to merit the serious consideration of that court.

Moreover, in both the *Becher* and *La Rosa* cases, the liquor purchased was in such large quantities that, as Circuit Judge Rose said in the *La Rosa* case, p. 481:

> "From the quantity and character of the intoxicants found, it might be assumed that La Rosa expected to sell the larger part of them."

The *Becher* and *La Rosa* cases were, therefore, much stronger cases than this case against Norris who purchased "for his own consumption or that of his guests; and he was in no sense a dealer of liquor." (Stipulation of Facts, R. 8.)

The circuit court of appeals for the third circuit, when the instant case was considered by it, was also of the opinion not only that there was no legal merit in the contentions of the Department of Justice but also that the position of the Department was open to criticism on other grounds. The court said (R. 24):

> "While the seller of liquor, who delivers it to the purchaser, is liable under the law both for the sale and transportation, the purchaser to whom the goods are delivered is chargeable with neither the purchase nor the transportation. It thus appears that while the legislative department of the Government has deliberately and intentionally made the purchaser of liquor guiltless of any offense under the prohibition law the executive department of the Government seeks here, by indirection, to make of the same fact, namely, the purchase, a crime subjecting the purchaser to a maximum fine of $10,000. and imprisonment for a term of two years. Such a situation is scarcely conceivable, and yet that is the position of the Government."

The petitioner need not labor the cases of *Cunard Steamship Co.* v. *Mellon,* 262 U. S. 100. *Grogan* v. *Walker & Sons,* 259 U. S. 80, and *Corneli* v. *Moore,* 257 U. S. 491 as holding that such transportation as there was in this case was in violation of the National Prohibition Act. We admit it. The circuit court of appeals so said (R. 24) in the paragraph just quoted. The seller was guilty not only of an illegal sale but also of an illegal transportation; and Kerper (the seller) has been convicted and served his sentence for

it. Thus the doctrine of the *Cunard* and similar cases has had full recognition and application in this very transaction.

The petitioner points to certain language in *United States* v. *Katz,* 271 U. S. 354-355, which, he says, "tends to support" the conspiracy charge. The *Katz* case was an earlier unsuccessful attempt by the Department of Justice to fasten the purchaser, by indirection, with a crime. The buyer and seller were indicted for conspiracy to sell whisky without making a record of the sale. The indictment was quashed by the district court, 5 F. (2d) 527, on the ground that the Prohibition Act does not require bootleggers to make records of sales. The case came to this Court on writ of error (not writ of certiorari) under the provisions of the Criminal Appeals Act of 1907; and it was affirmed, 271 U. S. 354. Mr. Justice Stone, speaking for this Court, pointed out, at p. 355, that the overt act charged was the sale of whisky by one defendant to the other, which is an offense under the National Prohibition Act; but that as the defendants

> "were only one buyer and one seller, and as the agreement of the parties was an essential element in the sale, an indictment of the buyer and seller for a conspiracy to make the sale would have been of doubtful validity."

He went on to point out that:—

> "This embarrassment could be avoided in an indictment for a criminal conspiracy *only* if the

buyer and seller were charged with conspiring to commit a substantive offense having an ingredient *in addition* to the sale, *not requiring* the agreement of two persons for its completion." (Italics ours.)

It is obvious that the transportation which does no more than effect the delivery of the goods sold, and which is, therefore, an essential ingredient of the sale, is not what Mr. Justice Stone, in the *Katz* case, called "an ingredient in addition to the sale, not requiring the agreement of two persons for its completion." The only transportation involved in the present case is such delivery—transportation and nothing more.

The "embarrassment" mentioned by Mr. Justice Stone cannot be avoided in this case. Judge Kirkpatrick in the District Court and the petitioner here attempt to avoid it by pointing to the two hypothetical cases supposed by that judge (R. 11): (*a*) The itinerant bootlegger; and (*b*) the sale of premises containing liquor, followed by the seller moving out and the buyer moving in. They conclude that transportation is not necessarily involved in every sale. It is to be remembered, however, that delivery is necessarily involved in every sale, even including those two hypothetical cases. And where the transportation is no more than delivery—transportation which effects and completes an essential ingredient of the sale itself, and is not in addition thereto, the fact that transportation is made a distinct substan-

tive offense by the National Prohibition Act is beside the point. Their argument overcomes but one of the two obstacles pointed out by Mr. Justice Stone in the *Katz* case.

The petitioner's brief is absolutely wrong when it says (p. 16) that the circuit court of appeals

> "adopted the theory that the transportation of liquor in this case was not a transportation prohibited by Section 3, but was a mere incident of the sale of the liquor."

The circuit court fully recognized that the seller was liable for both the sale and the transportation. (R. 24.) This very seller has been convicted and served his sentence for it. (See also p. 9 above.) That court said that in the case of seller and buyer the delivery—transportation was a mere incident in the sale and necessary to its completion; that since it was an essential element of the sale which the seller had to perform, and both buyer and seller had to agree in effecting the purchase, there was no conspiracy at such delivery—transportation. (R. 25.)

To answer all this, the petitioner argues that actual delivery to the purchaser of the article sold is not essential to a completion of the sale. (Petitioner's Brief, 17.) The cases of *Glasgow* v. *Nicholson*, 25 Mo. 29, *Davis* v. *Alpha Portland Cement Co.*, 134 Fed. 274, and *Patrick* v. *Meserve*, 18 N. H. 300 are cited in support. Those cases do not hold that the seller is not under the obligation to deliver. In all of them, the courts were simply dealing with the re-

spective contractual obligations of buyer and seller with respect to the means of effecting delivery according to the particular contracts which they had made. In all of them the duty of the seller to deliver the goods sold was recognized. There is no doubt as to such a familiar duty. See 2 Williston on Sales, 2d ed., 1908. The question often arises as to when the title of goods contracted to be sold passes to the buyer, and that may often be at a time different from the time of the delivery of the goods. Such questions are entirely immaterial for our purposes although they may be very important in cases of fire, bankruptcy, levy of execution and the like. The fact remains that in all cases of sales there must always be a delivery.

We are, of course, fully conscious that there may be and is much transportation of liquor which is not a necessary incident to a sale and at which two or more people, upon a showing of the necessary degree of cooperation and concert, could be held as conspirators under the Conspiracy Act. Where such are the facts involved in any such case, then it is very pertinent there that the Prohibition Act makes transportation a distinct substantive offense. Our point is that where the only transportation involved is such transportation as is the normal and necessary incident to the completion of a sale and purchase, the purchaser can no more be held for conspiracy at such delivery—transportation than for conspiring at the sale itself.

It is obvious that before one charged with conspiracy can be found guilty of that crime, he must be shown to have contributed, in the required degree, to the concerted action. The respondent Norris did not. The sum and substance of his contribution was that which is involved in the mere act of purchase; that which is afforded by every purchaser; and no more.

It will not be disputed that there may be a degree of cooperation which is insufficient to meet the requirements of conspiracy. In *United States* v. *Holte,* 236 U. S. 140, 144, Mr. Justice Holmes had occasion to discuss the degree of cooperation requisite to the crime of conspiracy and in the course of his discussion, seeking for an example of cooperation which all would recognize as obviously insufficient, he said

> "there may be a degree of cooperation that would not amount to a crime, as where it was held that a purchase of spirituous liquor from an unlicensed vendor was not a crime in the purchaser, although it was in the seller. *Com.* v. *Willard,* 22 Pick. 476."

The *Becher* and *La Rosa* cases, the instant case, and the principle just quoted from the *Holte* case, had back of them a long and uniform line of cases holding that the part played by the purchaser in an unlawful sale of liquor does not render him in any way criminally liable. The question has been so decided many times under state prohibition and licensing laws as well as under federal statutes prohibiting the sale of liquor to Indians. Such cases have uniformly held

that the purchaser commits no crime, whether such cases have been on indictments charging the purchaser with an alleged crime, or have been cases where the question was whether the purchaser had committed a crime and so would incriminate himself if he gave testimony against the seller. The scope of such latter cases is all-inclusive because if the proposed witness (the purchaser) had committed *any* crime in connection with the purchase, his testimony would incriminate him. Such cases, therefore, have necessarily passed upon the question in the instant case.

Com. v. *Willard,* 22 Pick. 476 (Mass. 1839), is an early and leading case which has always been followed. Chief Justice Shaw said, at p. 477:—

> "But the Court are of opinion, that the witness would not be liable to *any* prosecution as such purchaser, and therefore would not criminate himself or expose himself to punishment by such a purchase. No precedent and no authority has been shown for such a prosecution, and no such prosecution has been attempted within the knowledge of the Court, although a similar law has been in force almost from the foundation of the government, and thousands of prosecutions and convictions of sellers have been had under it, most of which have been sustained by the testimony of buyers. That such a prosecution is unprecedented, shows very strongly what has been understood to be the law upon this subject."

And he added, at p. 479:—

> "The statute imposes a penalty, upon any person who shall sell. But every sale implies a

purchaser; there must be a purchaser as well as a seller, and this must have been known and understood by the legislature. Now, if it were intended that the purchaser should be subject to *any* penalty, it is to be presumed, that it would have been declared in the statute, either by imposing a penalty on the buyer in terms, or by extending the penal consequences of the prohibited act, to all persons aiding, counselling or encouraging the principal offender. There being no such provision in the statute, there is a strong implication, that none such was intended by the legislature." (Italics ours.)

That court concluded that the purchaser committed no offense at all.

A full discussion of the entire subject is contained in *Lott* v. *United States,* 205 Fed. 28 (9th C. C. A. 1913), where the purchaser, an Indian, was indicted for soliciting and inciting the seller to commit the crime of furnishing liquor to an Indian who was none other than the purchaser Lott, himself. The circuit court of appeals reversed a conviction, with instructions to dismiss the complaint. The court said:—

"What was the intention of Congress in enacting the law? Was it intended to make unlawful the act of purchasing intoxicating liquor? If the answer is in the negative, it follows that an Indian who attempts to purchase intoxicating liquor, or solicits another to sell it to him, is guilty of no offense." (P. 31.)

"Congress must have been aware of the universal ruling of the courts that under laws

prohibiting the sale of intoxicating liquors the purchaser committed *no* offense. We are not justified in assuming that, in so amending the law and increasing the punishment for its violation, it was the intention to make criminal, and subject to punishment as a crime, the act of purchasing or attempting to purchase intoxicating liquors, which theretofore had been innocent acts. If such had been the intention of Congress, it is but reasonable to presume that it would have been expressed in such clear terms as to admit of no doubt. In the absence of such express legislation, we are authorized to presume that Congress deemed it of greater advantage to the government in enforcing the law to leave the Indian who might succeed in purchasing liquor in Alaska free to testify in the courts against the seller thereof, than to punish the Indian for purchasing, or offering to purchase, the same." (p. 51-2.) (Italics ours.)

With this old and universal line of cases back of it, the instant case could not have been properly decided in any other way.

The cases dealing with "entrapment" by federal agents also confirm the decision of the circuit court of appeals in this case with respect to the degree of cooperation necessary to constitute one a conspirator. It is the universal rule that a defendant will not be held guilty in a criminal case where the agents of the Government have induced him to commit the crime or conspired with him for its commission. It is the customary practice of Government agents, in

order to get evidence, to make purchases of the prohibited goods, *e. g.,* drugs or liquors, from suspected unlawful vendors. In such cases the defense has been repeatedly interposed that the Government agents by so doing entrapped, induced or conspired with the defendant in such a way and to such an extent as to give him the benefit of the entrapment rule. And it has been uniformly held that this defense is not good in cases where the agents merely purchased goods delivered to them, for the reason that the mere purchase is not such an entrapment, inducing or conspiracy. See, for example, *Lucadamo* v. *United States,* 280 Fed. 653 (2d C. C. A. 1922); *Rossi* v. *United States,* 293 Fed. 896 (8th C. C. A. 1923), and *DeLong* v. *United States,* 4 F. (2d) 244 (8th C. C. A. 1925).

The *Rossi* case was one of criminal contempt for violating an injunction against the transportation of liquor as well as against its sale; the court held that the conduct of one who "called up the defendant on a phone and ordered the delivery of 'six,' " falls "far short" of such inducing or soliciting of the delivery as amounts to entrapment. A fortiori, such conduct falls far short of the requirements of conspiracy.

All the pertinent cases, of which those cited by us are leading examples, clearly show that Norris did not furnish such degree of cooperation as is an essential prerequisite to a conviction for a criminal conspiracy. In doing no more than ordering the whisky and paying for it he did nothing which made him a felon.

As we have pointed out above (p. 4), the circuit court of appeals did not at all hold that the ordinary rules of criminal liability for conspiracy may not be invoked against a purchaser of liquor, as the petitioner urges. (Petitioner's Brief, 18.) On the contrary, the court said that it is not difficult to imagine a set of facts which would constitute a conspiracy even between buyer and seller. This decision gives the buyer no special immunity. It simply holds that purchasing is not conspiring at the transportation of the liquor which is merely the delivery of that which is sold. The decision has no application to other phases of the law of conspiracy and in no way narrows its proper application in liquor cases or elsewhere. The Government cannot point to any case, decided at any time, in which a defendant has been held guilty of conspiring at the transportation of any goods, the sale of which was illegal, when all such defendant did was purchase the goods delivered. If this decision is allowed to stand, the law remains unchanged. If it is disturbed, a change in the law will be effected. There are no common law offenses against the United States, and for an act to be criminal, it must be plainly and unmistakably within the provisions of an Act of Congress, and unless it is, it cannot be treated by the federal courts as a crime. If the Department of Justice does not like this branch of the law as it finds it, it must go to Congress to get it changed and not to the federal courts who cannot go beyond the legislative enact-

ment. There is no doubt that Congress is fully cognizant of the situation.

We respectfully submit that the petition for the writ of certiorari should be denied.

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